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No. 98-69

In The
Supreme Court Of The United States
October Term, 1997

SAL TINNERELLO & SONS, INC.,
Petitioner

v.

TOWN OF STONINGTON; STONINGTON RESOURCE RECOVERY AUTHORITY; AND DONALD R. MARANELL, FIRST SELECTMAN,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY / SUPPLEMENTAL BRIEF

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Pursuant to Supreme Court Rule 15, Tinnerello (Petitioner) submits this Reply Brief/ Supplemental Brief.

1) Trash takeover is not a core governmental function.

Stonington argues that its trash takeover constitutes "core governmental function." See brief at pp. 6 ff. This argument is also being made in other jurisdictions. See, e.g., *Houlton Citizens' Coalition v. Town of Houlton*, Civ. No. 97-216-B, (D. Me. 1998), 1998 U.S. Dist. LEXIS 9704, [Decided June 29, 1998]; *Huish Detergents Inc. v. Warren County, Kentucky*, Civil Action No. 1:97- C V-123-M, (W.D. Ky. 1998) [entered March 31, 1998] (unreported; currently on appeal to 6th Circuit); *Bennett Elec. Co. v. Village of Miami*, Case No. 97-0727-CIV-MORENO, (S.D. Fla 1998), 1998 U.S. Dist. LEXIS 8473 [Decided May 7, 1998]. This Court should grant certiorari to correct erroneous assumptions about government core functions.

Stonington's takeover of the trash market took place after Tinnerello operated for in excess of 25 years. How a power not previously exercised suddenly becomes a core function is a mystery, and should raise flags of concern for this Court. Under these courts' logic, any time any municipality chooses to take over any market, this apparently constitutes exercise of a "core

governmental function." [1]

Stonington's real point about "core governmental function" consists of misplaced reliance upon the *California Reduction* and *Gardner* cases. See brief at p. 7. Through grant of certiorari, this should to make unambiguously clear what it has already implicitly ruled in *Carbone*: The *California Reduction* and *Gardner* cases are irrelevant to modern dormant commerce clause inquiries.

Nevertheless, several courts act as if this Court in 1905 explicitly endorsed government trash, and immunized such takeovers from dormant commerce clause attack. See *USA Recycling, Inc. vs. Town of Babylon*, 66 F.3d 1272 (2nd Cir. 1995);

1/ Tinnerello expresses no opinion on what, if any, "core governmental functions" might be so tied to the state's ability to operate as a state that federal interference would destroy state sovereignty. Cf. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *see also* Dan T. Coenen, *The Impact of the Garcia Decision on the Market-Participant Exception to the Dormant Commerce Clause*, 1995 Univ. Ill. L. Rev. 727. If there are core governmental functions that cannot be interfered, trash collection is not one of them. The federal government already extensively regulates municipal solid waste. See 42 U.S.C. Section 6901ff. This Court several times this decade has prevented state or local government from doing with trash what the local government thought was best. See *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Oregon Waste Systems v. Oregon DEQ*, 511 U.S. 93 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan DNR*, 504 U.S. 353 (1992); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992).

Houlton, supra; *Bennett*, supra. Even if *California Reduction* and *Gardner* had anything to say about commerce clause challenges to a municipality's trash regulation, this Court should re-emphasize how the commerce clause landscape has changed since 1905. At the turn of the century there may have been doubt about federal ability to regulate local trash activities. In 1998 there is no doubt about Congress's commerce clause power to regulate local trash activities. Accordingly, dormant commerce clause scrutiny also is appropriate.

2) The second circuit bifurcates analysis of a unified regulatory scheme.

The second circuit's flawed market participation arguments also demonstrate why certiorari would be appropriate in this case. Under the second circuit's approach, government "takeover" of the trash market is artificially bifurcated from the contracts which the government makes as a result of the takeover. The local government's decision to take over the trash market is examined as an abstract proposition, even though designed to accomplish a specific flow control which could not have been enacted absent the takeover. Market participant arguments are then applied to contracts (contracting for disposal of *all* waste generated within the town) which could never have been made by a private entity. The result is market participation subterfuge. Although the government has expended no resources in market

participation, but has merely *decreed* that the market is now taken over, supposedly whatever it now additionally orders (via government contract) is immune from commerce clause attack. Surely the principles of *Carbone* cannot be so easily subverted.

3) Circuit differences are real.

Stonington erroneously claims that all lower courts are approaching waste monopoly situations in the same fashion. This is not so.

Stonington argues that the Third Circuit's focus upon the unified act of flow control designation is irrelevant to the second circuit's bifurcated evaluation of "takeover." It is, however, exactly this *difference* in approach which Tinnerello is drawing to this Court's attention. The *Harvey & Harvey* court analyzed the monopoly flow control issues before it as public utility actions. (68 F.3d 788, 800-03). There is no constitutional distinction between issues of public utility designation (third circuit) and government takeover (second circuit). National waste companies, such as amicus BFI, must operate under *different* rules to become exclusive service providers in the second circuit compared to the third circuit. The difference between the two circuits' approaches is real.

Differences also exist between the second and the eleventh circuits regarding the amount of

government investment required before government can claim market participant exemption. Stonington completely ignores Tinnerello's citation of the *GSW v. Long County* case and misreads the eleventh circuit's *Waste Recycling* decision. The eleventh circuit thus leaves open only the situation where a municipality completely invests in collection and disposal instead of bidding these out. Tinnerello's point is that the second circuit can *not* endorse market participant exemption for situations where the municipality has *not* invested its own resources in collecting and disposing of trash.

4) *Unless this Court reverses, lower courts will attribute improper significance to the second circuit opinions.*

An increasing number of lower courts are relying upon the second circuit's opinions to approve government-decreed waste monopolies which clearly violate *Carbone*. The second circuit's position is extremely sweeping. Under the decision for which review is here sought, any government-decreed waste monopoly is per se constitutional. This logic (?) unfortunately has been endorsed by lower courts in several jurisdictions, and is being considered in others. See *Houlton*, supra; *Huish Detergents*, supra; *Bennett Electric*, supra; *Waste Mgmt. of Alameda County v. Biagini Waste Reduction Sys.*, 74 Cal. Rptr. 2d 676 (Cal. App. 1998); *Zenith/Kremer Waste Sys. v. Western Lake Superior Sanitary Dist.*, 572 N.W.2d 300

(Minn.1997); cf. *National Solid Waste Management Association v. Williams*, 146 F.3d 595, 600 n.5 (8th Cir 1998) (indicating possibility that local government would adopt second circuit position after/if case became final). Thus *Carbone*'s prohibition on shut-off of waste competition is currently being elided by many courts which recently have looked at these issues.

Nor is the second circuit's reversal of *Carbone*'s presumptions likely to be confined to the waste context. The Kansas Supreme Court recently relied heavily upon the second circuit's waste opinions for its commerce clause ruling that a municipality which takes over commercial water distribution, leaving no room for private competition, *necessarily* cannot thereby violate the dormant commerce clause. *Water Dist. No. 1 of Johnson County v. Mission Hills Country Club*, 265 Kan. 355, 365- 71, __ P.2d __ (1998). [2]

2/ Tinnerello expresses no opinion about the correctness of this decision and notes that there may be significant differences between a water utility, which can only be administered out of fixed pipes, and waste collection and processing, which can be engaged in by any private company with proper trucks and access to landfills. Cf. *General Motors Corp. v. Tracy*; 519 U.S. 278 (1996); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders* (*Atlantic Coast I*), 48 F.3d 701, 714-15 (1995). The second circuit decision is precisely dangerous however, because it requires no meaningful justification for a monopoly beyond the municipality's declaration that it desires to take over a market for reasons *the municipality* deems important.

Allowing the second circuit's position to remain uncorrected has significant unfortunate consequences. In all jurisdictions where the second circuit's logic has been adopted, government shuts itself off from "the unobstructed flow of interstate commerce" which is presumed best able to solve interstate waste problems. See *Carbone*, 511 U.S. at 393; *Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (disapproving "from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all"). One need look no further than the very recent decision in *Automated Salvage Transp Inc. v. Wheelabrator Environmental Systems*, Docket No. 96-9281, (2d Cir. 1998), 1998 U.S. App. LEXIS 22030, [decided August 20, 1998] to see this happening at a state-wide level.

In *Wheelabrator* the second circuit ruled that it violates neither the Sherman Act nor the dormant commerce clause for a state organization to contract with potential competitors to prevent waste going to the competitors from generators in municipalities which have entered into exclusive contracts with the state organization. It is a condition necessarily precedent to the validity of these secondary agreements that the state organization's flow control contracts *with the municipalities* are themselves valid. The *Wheelabrator* court relied specifically upon the logic being challenged in the *instant* petition as background condition to the situation it addressed.

> The long-term waste disposal contracts that CRRA has negotiated with Connecticut municipalities as a vendor of waste disposal services are clearly market participation. See [*USA Recycling*; *SSC Corp.*]. The CRRA-Wheelabrator agreement to protect these contracts from interference by plaintiffs similarly involves the conduct of market participants, rather than the kind of regulatory power exercised by the State as a sovereign. [LEXIS *62]

The result is that Connecticut has effectively shut itself off from all interstate waste competition in order to prop up uncompetitive state created facilities. Other states might be expected to follow Connecticut's lead wherever the second circuit's logic finds favor.

It is unfortunately likely that this Court's continued silence has emboldened lower courts to twist *Carbone*'s commands. As Stonington notes at p. 12 of its brief, "*Significantly*, this Court had denied certiorari in *Atlantic Coast*, *Smithtown* and *Babylon*." (emphasis added). Although it is standard hornbook law that denial of certiorari signifies nothing about the correctness of decisions let stand, Stonington is not alone in attributing to this Court's silence about the 1995 second circuit waste decisions more significance than should be given. This Court's recent denial of certiorari in *Zenith/Kremer Waste Sys.*, 118 S. Ct. 1857 (1998) coupled with earlier denial of certiorari in *Atlantic Coast II*, 118 S. Ct. 412 (1997)

emboldens an increasing number of lower courts to believe that the second circuit's position is the de facto *approved* law of the land.

With the notable exception of BFI, amicus in this case, many larger waste companies may also have calculated that they stand as much to gain as lose by local government monopolies. In the instant case, it is in fact the subsidiary of a larger waste company, U.S.A. Waste, which has received Stonington's exclusive franchise. With the bigger waste companies receiving enough profit via exclusive contracts in some jurisdictions so that they may not wish to challenge such contracts in other jurisdictions, it is often the smaller waste players, who have far more limited resources, who must fight the appellate battles, if anyone does. The instant case is brought by a family business which seeks competition in a single regional waste market, and cannot balance unconstitutional restrictions in Connecticut against free markets in Nebraska .

The current petition for certiorari provides this Court an excellent opportunity to correct lower court misconceptions which seem to be gaining ground. This case does not involve side contracts negotiated between waste competitors. Cf. *Wheelabrator*, supra. The issue raised here is a more basic building block for commerce clause disputes. Because this case raises fundamental questions about government power to abolish interstate competitive markets, which questions

many lower courts are answering incorrectly, this Court should grant certiorari in the instant case.

5) The second circuit's contract clause rulings provide additional and independent grounds for certiorari.

Fuller development of Tinnerello's contract arguments can await the brief on the merits. It is worth noting at this point, however, that Stonington's Brief repeats one of the very second circuit Contract Clause errors which Tinnerello has drawn to this Court's attention in its Petition. This Court did *not,* either in *City of El Paso v. Simmons*, 379 U.S. 497 (1965) nor in *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) endorse the notion that any and all economic motivations justify government abrogation of private contracts. In situations where the government acts *to its direct economic benefit*, rather than to alleviate general social economic distress, Tinnerello respectfully submits that the hurdle for government action is much higher than the second circuit has placed it. Because the second circuit's approach under the Contract Clause is inconsistent with this Court's pronouncements, cf. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), certiorari should be granted in this case.

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